No. 05-355

In The
Supreme Court of the United States

SSW, INC.,

Petitioner,

v.

REGENTS OF THE
UNIVERSITY OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does this court have jurisdiction to review a state court's interpretation of a private contract, where neither the validity of a state statute nor the validity of a federal statute is drawn into question?

II. Where parties to a contract involving interstate commerce designate California law as the rule of decision, specify California arbitration rules, and provide that the agreement to arbitrate shall be enforceable under the prevailing arbitration law, does it offend the Supremacy Clause for California courts to enforce that agreement by applying section 1281.2(c) of the California Code of Civil Procedure?

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THERE IS NO BASIS OF JURISDICTION

Petitioner asserts that this court has jurisdiction pursuant to 28 U.S.C. §1257(a) and 9 U.S.C. §16(a). The asserted basis of jurisdiction is lacking.

Except for situations in which Congress has specifically authorized collateral review of state court judgments, a party who seeks to overturn a state court judgment must proceed through the state judicial system; a party can only seek review in the United States Supreme Court pursuant to 28 U.S.C. §1257. *4901 Corporation v. Town of Cicero*, 220 F.3d 522 (7th Cir. 2000). This Court does not have jurisdiction pursuant to 28 U.S.C. §1257(a). Section 1257(a) provides that the United States Supreme Court may review the decree rendered by the highest court of a state in which a decision could be had, where (1) the validity of a treaty or statute of the United States is drawn in question, or (2) where the validity of a statute of any state is drawn in question (a) on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States, or (b) where any right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States. The petition in this case challenges neither a treaty nor statute of the United States, nor the validity of any state law. To the contrary, the petition concedes the validity of Cal. Code Civ. Proc. §1281.2(c), and its relationship to the Federal Arbitration Act, 9 U.S.C. §§1-16, as set forth in *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989). Petitioner does not claim any right, privilege or immunity under the Constitution, a treaty, or a statute of the United States. The sole right petitioner claims arises from its private agreement. The interpretation of that agreement

by the California Court of Appeal in this case does not raise a reviewable issue under 28 U.S.C. §1257(a).

Petitioner erroneously asserts that the Court has jurisdiction because "this petition for a writ of certiorari arises from the denial of SSW's petition to compel arbitration." Petition, p. 1. The Federal Arbitration Act, however, is not jurisdiction-granting. *Klein v. Drexel Burnham Lambert, Inc.*, 737 F. Supp. 319 (D. Pa. 1990). Moreover, a state court's denial of a motion to compel arbitration, on the grounds that the parties intended the state court arbitration procedures to apply, is not one of the enumerated grounds for appeal mentioned in 9 U.S.C. §16.

STATEMENT OF THE CASE

Irrespective of the jurisdictional issue, this case does not present a substantial federal question for review by this Court. The California Court of Appeal in this case, routinely and appropriately, applied settled federal and state law holding that arbitration is a matter of agreement between the parties to the contract. The courts in this case correctly enforced the parties' agreement, which provides that California law, including California's arbitration procedures, will be applied to any dispute between them.

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) the court noted that, unlike its federal counterpart, the California Arbitration Act, Cal. Code Civ. Proc. Ann. §1280 *et seq.* (West 1982), contains a provision allowing a court to

stay arbitration pending resolution of related litigation.[1] The Court held that application of the California statute, Cal. Code Civ. Proc. §1281.2(c), is not pre-empted by the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, in a case where the parties have agreed that their arbitration agreement will be governed by California law.

In this case, as outlined in the California Court of Appeal's decision (Petition, p. 6a), the parties unequivocally agreed that their arbitration agreement will be governed by California law. The contract between the parties contained the following choice of law provisions:

> "*Governing laws.* This Contract Order shall be governed by, and enforced in accordance with the laws of the State of California, exclusive of conflicts by laws provisions."
>
> "*Arbitration*: If the foregoing procedures do not resolve the dispute, the dispute shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing as supplemented by Section 1282.6, 1283 and 1283.05 of the California Code of Civil Procedure, unless the parties mutually agree otherwise. Selection of arbitrators shall be in accordance with rules of

[1] The court, in *Volt*, found that the California arbitration rules generally foster the federal policy favoring arbitration. Noting that the Federal Arbitration Act contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when, as in the present case, some or all of the contracts at issue include agreements to arbitrate. The court lauded California for taking the lead in fashioning a legislative response to this problem, by giving courts the authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments. *Volt*, 489 U.S. 468, note 5.

> the American Arbitration Association. The Arbitrator(s) shall be bound by, and apply California law. Each party hereto expresses consent that any arbitration arising of [*sic*] or relating to this Agreement, or the breach thereof, may, at the option of either party, include by consolidation, joinder or in any other manner, other persons involved in or affected by such claim, dispute or other matter. . . . The foregoing agreement to arbitrate . . . shall be specifically enforceable under the prevailing Arbitration Law. The award rendered by the Arbitrators shall be final, and the judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. All arbitration proceedings hereunder shall, unless all parties hereto otherwise agree, be conducted in the County of San Francisco."

In *Volt*, the California Court of Appeal held that by specifying that their contract would be governed by "the law of the place where the project is located," the parties had incorporated the California rules of arbitration, including Cal. Code Civ. Proc. §1281.2(c), into their arbitration agreement. 489 U.S. at 470. In this case, the objective intent of the parties was even clearer. Interpretation of private contracts by state courts, of course, is a question of state law, which this Court does not sit to review. See, *Volt*, 489 U.S. at 494. Moreover, as the court indicated in *Volt*, "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed

where the Act would otherwise permit it to go forward." *Id.* at 472.[2]

STATEMENT OF FACTS

In early 1994, the Regents of the University of California (Regents) contracted with Walsh Construction Company (Walsh) for construction and renovation of a Central Utilities Plant at the Parnassus campus of the University of California, San Francisco, California (Project). The Petitioner entered into a subcontract with Walsh to supply and install two heat recovery steam generators, and related equipment, for the Project.[3] The subcontract was for the express benefit of the UC Regents. After the project was underway, Walsh's parent company filed for bankruptcy. Project sureties, Fidelity and Deposit Company of Maryland and Universal Underwriters Insurance Company, took assignment of Walsh's obligations and rights under Walsh's contract with the Regents. Many problems arose on the Project, and in June 1999, the UC Regents filed suit against the sureties in California State Court to recover on the performance bond. On June 8, 2001, the Regents amended their complaint to include a cause of action against Petitioner and others.

[2] In *Volt*, the court addressed, and resolved, the validity of Cal. Code of Civil Procedure §1281.2(c) *vis-à-vis* the FAA. The validity of this statute, or any statute, is not at issue in this case. The only issue presented by this case is the contract interpretation issue, and this is why this Court had jurisdiction in *Volt*, and the Court does not have jurisdiction in this case.

[3] Petitioner entered into a subcontract with Walsh Construction as National Dynamics Corporation. SSW, Inc. (SSW) subsequently acquired all assets and liabilities of National Dynamics Corporation.

The contract between Walsh and SSW includes a choice of law clause that specifically states that the contract is to be enforced under California law. The contract also provides that the arbitration agreement shall be enforced under California law. The agreement between the Regents and Walsh, the general contractor, however, did not contain an arbitration provision. SSW filed a petition to compel arbitration, which was denied, pursuant to Cal. Code Civ. Proc. §1281.2(c), on the grounds that there was a potential for inconsistent rulings if the controversy were adjudicated in multiple forums.

The California Court of Appeal affirmed the decision. The Court of Appeal focused on the parties' general choice of law (California) and the choice of law for arbitration (California), and correctly concluded that the parties intended their arbitration clause to be subject to §1281.2(c). SSW appealed to the California Supreme Court which, after initially accepting review pending its decision in another case, declined to hear the case. Pursuant to California appellate procedure, the Court of Appeal decision became final when the Supreme Court dismissed its review of the case.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. NO FEDERAL LAW ISSUE IS PRESENTED IN THIS CASE

This case presents no substantial federal question for review by this Court. The California Court of Appeal simply followed settled federal and state law holding that arbitration is a matter of agreement between the parties.

The Court of Appeal enforced the parties' agreement, including their choice of law for arbitration, according to the objective intent that is manifest in the agreement. For this reason, this Court lacks jurisdiction to grant the petition. See pp. 1-2, above.

A. The Court Of Appeal Properly Looked To The Contract Language To Determine The Objective Intent Of The Parties.

The unanimous thirty-one page Court of Appeal decision in this case relies on California's law of contract interpretation. Petitioner concedes that the Court of Appeal's decision "turned upon the interpretation of the arbitration agreement." See, Petition, p. 11. The Court of Appeal determined that, in the absence of extrinsic evidence to the contrary, it must look to the language of the contract to determine the intentions of the parties.

A state court's interpretation of a choice of law clause in a privately negotiated agreement does not present a question for review by this Court. Additionally, the determination that state law applies does not conflict with the FAA or burden a federal right because the purpose of the FAA is to ensure enforcement of parties' agreements, not to replace those agreements. In this case, the Court of Appeal relied on three clauses in the contract between Petitioner and Walsh. First, the agreement included a general California choice of law clause; second, the arbitration provision in the agreement made reference to specific provisions of the California Arbitration Act and provided that the arbitrator would be bound by California law; and third, the agreement provided that the arbitration agreement would be enforced under California law. The provision reads as follows: "The foregoing agreement

to arbitrate . . . shall be specifically enforceable under the prevailing Arbitration Law." Civil Code Section 1281.2 is found in Title 9, Chapter 2 of the Code of Civil Procedure, which is entitled "Enforcement of Arbitration Agreements." In the context of the overall provision, therefore, there can be no doub that "prevailing Arbitration Law" means California Arbitration Law. In other words, the California Court of Appeal's determination that the parties intended to have Cal. Code Civ. Proc. §1281.2 apply to their agreement, is unremarkable and manifestly reasonable. Any interpretation of the contract other than that made by the California Court of Appeal would be inconsistent with the intent of the parties as expressed in the contract and would undermine the purpose of the FAA to enforce the parties' agreement.

B. Petitioner Misapprehends And Distorts The Effect Of The California Supreme Court's Dismissal Of Its Review Of The Present Case; Petitioner Further Distorts The Holding Of The Factually And Legally Disparate Decision In *Cronus*.

Petitioner embarks on a flight of fancy by suggesting that the California Supreme Court, by dismissing review of this case, somehow "evince(d) a conclusion" that "section 1281.2(c) should apply ***irrespective*** of the intent of the parties."[4] This flagrantly distorts what the California

[4] Petitioner also incorrectly states: "However, the California Supreme Court did not examine or opine on the lower court's conclusions, which turned upon the interpretation of the arbitration agreement. Instead, the court relied solely upon its decision in *Cronus* to reject SSW's petition to compel arbitration. [¶]The *Cronus* decision had openly rejected the parties' contractual agreement as to the law that

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Supreme Court did in this case, and what the Court said in *Cronus Investment, Inc. v. Concierge Services, LLC*, 107 P.3d 217 (Cal. 2005). The California Supreme Court never issued a decision in this case; to the contrary, the Court dismissed its review of this case. See Petition 1a. This dismissal automatically made the opinion of the Court of Appeal final. Cal. R. of Court 29.3(b). In other words, the Court of Appeal decision, not some fanciful construct that Petitioner incorrectly attributes to the Supreme Court, reflects the final word on this case by the California courts.[5]

Petitioner further exhibits a lack of understanding of California appellate procedure when it asserts that "The California Supreme Court, pursuant to Cal. Rules of Court 29.3(b), could have ordered the publication of the court of appeal decision if the opinion below was intended to be the law of the State," and concludes (incorrectly) that, because the Court did not order the Court of Appeal decision to be published, this somehow requires Petitioner to imagine an

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would govern the arbitration agreement and, instead, presumptively applied California law ***as a default*** (emphasis in original)." Petition, p. 11. Of course, this is pure fiction. The California Supreme Court did no such thing: the Court simply dismissed the petition for review, which made the Court of Appeal's decision the final word on this matter in the California courts. The California Rules of Court, Rule 29.3(b) states: "(1) The Supreme Court may dismiss review. . . . (2) When the Court of Appeal receives an order dismissing review, the decision of ***that*** court becomes final and its clerk must promptly issue a remittitur or take other appropriate action. (3) After an order dismissing review, the Court of Appeal opinion remains unpublished unless the Supreme Court orders otherwise." (Emphasis added).

[5] See Petition, pp. 4a-24a.

implied holding by the California Supreme Court – a holding that was never made by any court, anywhere.[6]

C. The California Courts Do Not Apply A *De Facto* Presumption To Determine What Law Governs Arbitration Agreements. Petitioner Distorts And Misrepresents The Cases.

Petitioner incorrectly alleges that California courts rely on a *de facto* presumption that California law governs arbitration clauses. There is nothing in the history of the present case, or in any of the cases on which Petitioner relies, to indicate the existence of such a presumption.

To support its false assertion that the California courts apply a *de facto* presumption to conclude that California law applies to arbitration clauses, SSW rewrites the holdings of four California cases. Every case upon which Petitioner relies to demonstrate such a supposed bias, in reality involves a thorough investigation by the respective court of the contracting parties' objective intent. The method of contract interpretation employed by these cases is consistent with the purpose of the FAA and with this Court's decisions in *Volt* and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

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[6] See Petition, footnote 4. Decisions of the California Courts of Appeal are not published unless a decision establishes a new rule of law, conflicts with existing law, involves an issue of continuing public interest, or makes a significant contribution to legal literature. Cal. R. of Court 976. When a California Court of Appeal decision is not published, as in this case, the only proper conclusion that can be drawn is that the case is consistent with existing California law.

i. *Cronus Investment, Inc. v. Concierge Services, LLC*

The central focus of SSW's petition is the decision in *Cronus Investment, Inc. v. Concierge Services, LLC*, which, it claims, shows that California is ignoring contracting parties' intentions in order to apply California law. 107 P.3d 217 (2005). Even the most topical review of the California Supreme Court Decision in *Cronus*, however, indicates that the Court looked to the parties' objective intent rather than applying a *de facto* presumption.

While Petitioner is correct that the contract in *Cronus* called for arbitration under the terms of the Federal Arbitration Act "if it would be applicable," both parties conceded that their selection of California law in the choice of law clause meant that California law applied to the arbitration clause insofar as it was not inconsistent with the FAA. *Id.* at 219. This concession meant that the California Supreme Court was not required to further investigate the parties' intent. Relying on this Court's decision in *Volt*, the California Supreme Court held that Cal. Code Civ. Proc. §1281.2(c) is consistent with the FAA, and that its application was appropriate in that case. *Volt*, 489 U.S. at 472.

More egregiously, as noted above, Petitioner suggests that in *Cronus* the California Supreme Court held that §1281.2(c) should apply in this case, "*irrespective* of the intent of the parties." Petition p. 13. Of course *Cronus* makes no mention whatsoever of the present case, and the

holding that is incorrectly imputed by Petitioner is directly contrary to what the court in *Cronus* said. 107 P.3d 217.[7]

ii. *Mount Diablo Medical Center v. Health Net of California, Inc.*

In *Mount Diablo Medical Center v. Health Net of California, Inc.*, the California Court of Appeal found as a matter of contract interpretation that when the parties to a contract indicate in a choice of law clause that the contract is to be *enforced* under California law, the parties intend the arbitration clause to be governed by California law. 124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002). The Court of Appeal derives the parties' intent directly from the

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[7] "The parties (do) dispute whether they intended that section 1281.2(c) procedures would govern the enforcement of those contracts that contain the arbitration provisions. Under United States Supreme Court jurisprudence, we examine the language of the contract to determine whether the parties intended to apply the FAA to the exclusion of California procedural law and, if any ambiguity exists, to determine whether section 1281.2(c) conflicts with or frustrates the objectives of the FAA." Petition, at 33a. . . . "The parties seem to agree that the broad choice-of-law provision generally incorporates California law, including the California Arbitration Act (CAA) (§1280 et seq.), of which section 1281.2(c) is a part." See Petition, at 38a. "Our opinion does not preclude parties to an arbitration agreement to *expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law. We simply hold that the language of the arbitration clause in this case, calling for the application of the FAA "if it would be applicable," should not be read to preclude the application of 1281.2(c), because it does not conflict with the applicable provisions of the FAA and does not undermine or frustrate the FAA's substantive policy favoring arbitration." See Petition, at 50a.

terms of the contract and does not rely on any *de facto* presumption.[8]

iii. *Discover Bank v. Superior Court*

Petitioner incorrectly asserts that in *Discover Bank v. Superior Court* the California Supreme Court disregarded the selection of Delaware law with respect to the enforceability of a class action waiver. 30 Cal. Rptr. 3d 76 (Cal. 2005).[9] In fact, the opposite is true. The California Supreme Court remanded the case for determination of whether the Delaware choice of law clause required enforcement of the class action waiver. *Id* at 79. This case stands in direct opposition to Petitioner's suggestion that the California courts are applying a *de facto* presumption that California law governs arbitration agreements.

iv. *Frankhouse v. Roth Capital Partners, LLC*

Petitioner cites to *Frankhouse*, No. G033765, 2005 WL 1406004 (Cal. App. June 16, 2005) in violation of Cal. R. of Court 977, which bars the citation of unpublished opinions.[10] Additionally, Petitioner mischaracterizes the

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[8] The court held as follows: "We interpret the authorities on the subject to require the court to look first to the language of the contract to determine what portions of state law the parties intended to incorporate, and then, if any ambiguity exists, to determine whether the provision in question conflicts with the objectives of the FAA. Under this approach, we conclude that the parties intended to incorporate California procedural law governing the enforcement of their agreement to arbitrate, and that these provisions are not preempted. Therefore we affirm." 124 Cal. Rptr. 2d 607, 608.

[9] Petitioner improperly cites this case at 113 P.3d 1100 (Cal. 2005).

[10] Rule 977. Citation of opinions. (a). Unpublished opinion. Except as provided in (b), an opinion of a California Court of Appeal or superior

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decision in *Frankhouse*. The Court of Appeal in that case did not apply a *de facto* presumption that California law would apply. There, the Court of Appeal only resorted to California law after the parties repeatedly failed and refused to present the court with relevant New York law that might apply. *Id.* The Court noted that, although the agreement between the parties appeared to contain a New York choice of law clause, neither party raised this as an issue relevant to the arbitration question with the trial judge. *Id.* They neglected to raise the New York law issue either before or after learning of the trial judge's intent to deny their motion to compel arbitration based on California law. *Id.* Throughout, the parties relied on California law in their motion to compel arbitration: the parties even failed to mention or discuss the New York choice of law clause in their letter briefs after the appellate court directed their attention to the clause in oral argument. *Id.* In the absence of any engagement by the parties on this issue, and pursuant to established California authority, the California Court of Appeal reasonably assumed that there must be no relevant distinction in the applicable law and looked to California law to solve the problem. *Id.* Regardless, of course, this decision bears no relation to the case at bar, which included, not one, but three choice of law clauses requiring that the contract be enforced under California law.

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court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action. (b). Exceptions. An unpublished opinion may be cited or relied on: (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or (2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

Although Petitioner goes to great lengths to attempt to demonstrate a *de facto* presumption in California law, going so far as to mischaracterize the holding of four cases, and citing a case in contravention of the California Rules of Court, there is no *de facto* presumption – the cases cited by Petitioner simply confirm that California Courts are interpreting contractual arbitration agreements consistent with the intent of the parties.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated this 19th day of October, 2005.

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